LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
JUL 6 1965
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1965

No. 321

FOTOCHROME, INC.,

Petitioner-Appellant,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS FISCHOFF,
Counsel for Appellant,
205 West 34th Street,
New York, N. Y.

INDEX

	PAGE
Introduction	1
Opinion Below	1
Jurisdiction	2
Statutes	2
Statement	2
The Questions Presented Are Substantial	6
Conclusion	9
Appendix A—Decree	App. 1
Appendix B—Opinion	App. 3
Appendix C—Section 8(a) of National Labor Relations Act	App. 10

TABLE OF CASES CITED

H. J. Heinz Co. v. *NLRB*, 311 U.S. 514	8
Jordan Bus Co., 107 NLRB 717	6
Mastro Plastics Corp. v. *NLRB*, 350 U.S. 270	6
NLRB v. *Hinde & Dauch*, 171 F. 2nd 240	8

PAGE

NLRB v. *Montgomery Ward & Co.*, 157 F. 2nd 486 8

NLRB v. *Schwab Mfg. Co.*, 297 F. 2nd 864 8

Pittsburgh Steamship Co. v. *NLRB*, 340 U.S. 498, affirming 180 F. 2nd 731 8

Scott and Scott v. *NLRB*, 245 F. 2nd 926 6

Stowe-Woodwarde Inc., 123 NLRB 287 6

Wintergarden Products Cooperative v. *NLRB*, 238 F. 2nd 128 6

OTHER AUTHORITIES CITED

National Labor Relations Act, Sec. 8(a)(1),(2), (3), and (5) ..... 2, App. 10, App. 11

28 U.S.C. Sec. 1254(1) 2

Supreme Court of the United States

OCTOBER TERM, 1965

No.

FOTOCHROME, INC.,
Petitioner-Appellant,

—against—

NATIONAL LABOR RELATIONS BOARD,
Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Introduction

The appellant, Fotochrome, Inc., by Louis Fischoff, Esq., prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered in the above entitled case on April 30, 1965. The decree is set forth herein as Appendix A.

Opinion Below

The United States Court of Appeals for the Second Circuit granted the petition of the National Labor

Relations Board (hereinafter called the Board) for its enforcement of its order made and reported as 146 NLRB #120. The opinion of the Court below is set forth herein as Appendix B.

Jurisdiction

It is believed that jurisdiction is conferred on the Supreme Court of the United States by 28 U.S.C. Sec. 1254 (1).

Statutes

The statute involved is the National Labor Relations Act as amended (hereinafter referred to as the Act), Sec. 8 (a) (1), (2), (3), and (5) and set forth herein as Appendix C.

Statement

The appellant is a wholesale photo finisher servicing retail stores which accept photographic film from their own customers for developing and processing. Appellant at the times set forth herein had plants at Elmsford, N.Y. and in the Borough of the Bronx, City of New York. For many years prior to the events set forth below the appellant and the Blue Print, Photostat, and Photo Employees Union Local 249, affiliated with the International Jewelry Workers Union AFL-CIO (hereinafter called the Union), had been parties to several successive collective bargaining agreements. Typically, the Union would bargain with an association of employers and then proffer the resultant contract to non-members of the association, among them the appellant. The appellant and Union

would initial a rider which by its terms adopted the association contract.

The appellant contended that its last contract with the Union was not identical with the association agreement. The Union disputed this, claiming it had never signed a contract with appellant other than in rider form. The issue was not resolved below. (JA 387-89 and cf. JA 135 et seq.*)

The last contract between appellant and the Union expired on April 30, 1962. Shortly thereafter the appellant inquired about the terms of the new association contract in order to put into effect the pay increase provisions as soon as possible. Because of certain Union commitments to attend an International convention, appellant and the Union were unable to meet to discuss their own contract until some time late in May and the appellant in the interim did in fact institute substantially the new pay provisions of the association agreement.

On May 24, 1962, the appellant and Union did meet and differences and disagreements developed between them over the provisions of the new agreement proposed by the Union. More accurately it may be stated that the Union proposed a rider adopting all of the terms of the association agreement without change or modification and the appellant demurred to certain of the provisions of that agreement applying to it. The meeting of May 24 ended without agreement reached but with an adjournment date set. On

* References are to the Joint Appendix.

May 28, 1962, another union, Local 422, International Protection Sales and Service Employees began an organizational drive at the appellant's plant. Local 422 was directed to appellant's plants by an employee in Elmsford who had been a former shop steward of Local 422, at the plant of another employer. (The Court below is in error in its statement that the invitation to Local 422 was by one of appellant's supervisors (JA 303-4).)

This organizational attempt by Local 422 began sometime after lunch on the day of May 28th. During the course of the day a few of the appellant's minor supervisors were found by the Board to have rendered assistance to Local 422 for their own private reasons and personal motivations. There is no evidence in the record that their activities were initiated or approved or ratified by the appellant. On the contrary, at about 2:30 or 3:00 o'clock in the afternoon Frank Nadaline, Jr., the appellant's president having learned of the organizing attempt by Local 422 and of a strike call by Local 249, began speaking to the supervisors who were active on behalf of Local 422 to dissuade them from their activities and as well spoke to several workers in the same vein.

Finally, at about 5:00 P.M. he disavowed the actions of his supervisors directly to Wisotsky, one of the Union's representatives, and at the time the Union business agent for Fotochrome (JA 141).

Between the commencement of the organizing attempt by Local 422 some time after the noon hour at the Elmsford plant and 4:00 o'clock or so on the same day, a substantial portion of the workers at

the Bronx plant were on strike in response to Local 249's strike call.

At this point Nadaline telephoned officials of Local 249, asking them to come up and see if the situation at the plant could be straightened out. Local 249's President, Mac Young, and the business representative (later vice president) assigned to Fotochrome, Edward Wisotsky, responded to Nadaline's call and met him in his office in the Bronx plant.

The Union's sole condition for calling off the strike was that Nadaline sign a rider adopting the association contract in toto and that in fact the rider be pre-dated to a date before May 28th, 1962 (JA 120-21, 146-47, 411).

Neither Young nor Wisotsky made any demands whatsoever looking to expunge the alleged effects of the actions of the appellant's supervisors on the employees. Neither did they demand continued recognition as a bargaining agent for appellant's employees and continued bargaining to resolve the differences between the parties over the association contract. (Both the Court below and the Board failed to distinguish between continued recognition and bargaining and the flat demand for signing a rider accepting the association contract.) Young directly stated that unless a rider was signed, the strike would go on.

Nadaline refused to sign a rider, much less a predated rider. The parties did not meet subsequent to that date and the strike has continued to the present time. On September 17, 1962, Local 249 on behalf of the strikers sought reinstatement for them.

The Questions Presented Are Substantial

Is there substantial evidence to support the finding that after the meeting between the appellant and the Union on the afternoon of May 28, 1962, that the strike maintained by the Union was in protest against unfair labor practices?

Is there substantial evidence in the Record to support the Board's contention that the appellant did not effectively disavow the acts of its supervisors?

The Questions Presented Are Substantial

The mere fact that within the context of union-management relations an employer, directly or by agents for whom it is accountable, commits an unfair labor practice does not by itself sustain a finding that a work stoppage occurred coincidentally is an unfair labor practice strike. There must be substantial evidence in the Record considered as a whole that there is a causal relationship between the work stoppage and the unfair labor practice.

Mastro Plastics Corp. v. *NLRB,* 350 U.S. 270, 273 and n. 4;
Scott and Scott v. *NLRB,* 245 F. 2nd 926;
Wintergarden Products Cooperative v. *NLRB,* 238 F. 2nd 128;
Stowe-Woodwarde Inc., 123 NLRB 287;
Jordan Bus Co., 107 NLRB 717.

In the instant case the appellant was faced with the actions of supervisors acting on their own and in a manner contrary to company policy to assist one of two unions contending for the support of the appellant's employees. Local 249 called the strike ostensibly

to protest those actions. On the same day Frank Nadaline, Jr., called a meeting between himself and the representatives of the striking union in order to straighten out that dispute. At that meeting Local 249, however, presented a single condition, unconnected with the alleged unfair practices, upon which it would abandon its strike. Both Young and Wisotsky sought to obtain from Nadaline the appellant's agreement to a rider adopting the terms of the association agreement. Contrary to the assertion by the Court below, the appellant, through Mr. Nadaline, did not refuse to recognize Local 249 or to bargain with its representative. Nadaline refused to execute a contract and at that, a predated contract. Indeed, in calling the meeting that day Nadaline obviously recognized his obligation to the Union. The decision of the Court below overlooks the fact that prior to the events of May 28, the appellant and Local 249 were in disagreement over the terms of a new collective bargaining agreement. The issue presented to Nadaline, the appellant's operating head, by Local 249's officials had nothing to do with continued bargaining, or disavowal of the actions of the appellant's supervisors, but was directed solely to obtain economic concessions previously refused by Nadaline.

The Court below, therefore, in entertaining enforcement of the Board's order has afforded reinstatement with back-pay to strikers whose sole purpose in striking was to obtain a contract on their own terms. Indeed, the strike actually was maintained for a patently unlawful purpose: The execution of a predated contract.

This is not to suggest that a strike for both lawful and unlawful objectives may not result in the protec-

tion of the lawful objectives, or that a strike called for mixed objectives, both economic and to protest unfair labor practices, should not result in a remedy for the unfair labor practices, but it is to assert that a strike maintained solely for an economic objective should be denied the protection, reserved for unfair labor practice strikers.

The question presented here is substantial and has pervasive importance to the conduct of labor-management relations. The supervisory interference here was no part of any company plan or intention (cf. *H. J. Heinz Co.* v. *NLRB,* 311 U.S. 514). There is moreover no background of anti-union hostility.

Pittsburgh Steamship Co. v. *NLRB,* 340 U.S. 498, affirming 180 F. 2nd 731;
NLRB v. *Montgomery Ward & Co.,* 157 F. 2nd 486;
NLRB v. *Schwab Mfg. Co.,* 297 F. 2nd 864;
NLRB v. *Hinde & Dauch,* 171 F. 2nd 240.

Finally, the appellant through Nadaline entered directly into negotiations with the striking Union in order to straighten out the situation, and was presented as has been said, solely with economic demands as the price of a settlement. If the order of the Board under such circumstances is sustained it will mean in effect that regardless of company policy or intent the ill-advised and unwanted actions of company supervisors will result in forced economic concessions upon a company as the price of purging itself of the unfair practices. The remedy of reinstatement with back-pay designed to protect employees against attempts to interfere with their bargaining rights will become a weapon to force economic concessions.

It is in this light that the second question presented also must be considered. No more direct or effective disavowal of the actions of the supervisors could be had than that which Nadaline took, namely dealing with the responsible representatives of the Union directly. That he communicated to them the Company's disavowal of its supervisors' actions is undenied. If, then, for its own purposes Local 249 continued the strike, it should not be afforded the remedies designed to protect employees from attempts by employers to disrupt their bargaining rights.

If the Court below and the Board are sustained, a rule of law will be promulgated which will charge an employer with absolute liability for the actions of its supervisors at all levels. Such a rule will force upon an employer a Hobson's choice between making economic concessions it would not otherwise make, or facing the penalty of reinstatement with back-pay. Unions will be able to strike for economic objectives under the cover of the protections afforded to unfair labor practice strikers.

CONCLUSION

For the reasons set forth herein it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

LOUIS FISCHOFF,
Counsel for Appellant,
205 West 34th Street,
New York, N. Y.

Appendix A

DECREE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 29317

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

FOTOCHROME, INC.,

Respondent.

Before: SMITH and MARSHALL, *Circuit Judges* and DOOLING, *District Judge.**

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent on April 23, 1964. The Court heard argument of respective counsel on March 11, 1965, and has considered the briefs and transcript of record filed in this cause. On April 8, 1965, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals

---

* Sitting by designation.

for the Second Circuit that the said order of the National Labor Relations Board, in said proceeding be enforced, and that Fotochrome, Inc., its officers, agents, successors and assigns abide by and perform the direction of the Board in said order contained.

J. JOSEPH SMITH
Judge, United States Court of Appeals for the Second Circuit

THURGOOD MARSHALL
Judge, United States Court of Appeals for the Second Circuit

FILED: APRIL 30, 1965.

A true copy,
A. DANIEL FUSARO
Clerk

Appendix B

OPINION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 379—September Term, 1964.

(Argued March 11, 1965 Decided April 8, 1965.)

Docket No. 29317

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

FOTOCHROME, INC.,

Respondent.

Before:

SMITH and MARSHALL, *Circuit Judges,* and DOOLING, *District Judge.**

Petition by National Labor Relations Board for enforcement of its order of April 23, 1964 reported at 146 NLRB No. 120, requiring respondent employer to cease and desist from recognizing or supporting Local 422, International Production Service and Sales Employees Union, or otherwise interfering with its

---

* Sitting by designation.

employees' free choice of representative, from refusing to bargain with Local 249, International Jewelry Workers Union, from discrimination in hiring and tenure, from promising benefits for forbidden purposes, and affirmatively, requiring respondent to bargain with Local 249, withdraw recognition from Local 422, offer reinstatement and back pay to unfair labor practice strikers, and post appropriate notices. Enforcement ordered.

WILLIAM J. AVRUTIS, Attorney, National Labor Relations Board (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Asst. General Counsel, and Allison W. Brown, Jr., NLRB, on the brief), *for petitioner.*

BURTON H. ZUCKERMAN, New York, N. Y., *for respondent.*

SMITH, *Circuit Judge*:

Respondent, a photo finisher, and its predecessors, with plants at Elmsford, New York and in the Bronx, had for many years bargained with Blueprint, Photostat & Photo Employees Union Local 249, International Jewelry Workers' Union, AFL-CIO. The usual practice was for the employer and the union to bargain on the basis of a contract between the union and an employers' group of which Fotochrome was not a member and for Fotochrome to sign a rider to the group contract. The 1960 contract, the terms of

which were somewhat in dispute, expired April 30, 1962. On May 7, Fotochrome inquired about the terms of new contract with the employer group in order to put the new pay provisions into effect as of May 1, which it substantially did. On May 28, no new contract having been signed by Fotochrome, another union, Local 422, International Production Service and Sales Employees Union, at the invitation of one of Fotochrome's supervisors, a former shop steward of Local 422 at the plant of another employer, sent organizers to the Elmsford plant of Fotochrome, obtained signature cards from a number of the employees and sent organizers to the Bronx plant where they began to sign up employees in the street adjoining the plant. Local 249's shop steward at the Bronx plant, on notifying the union office of Local 422's activity, was told to pull the employees out on strike if necessary to halt the Local 422 activity. He did so and picket lines were established.

Nadaline, respondent's president, learned of the efforts of some other union to come in and of the strike, through the Bronx plant phone operator who overheard an official of Local 249 telling the shop steward to pull the employees out. Nadaline went into the shop and spoke to the shop steward, who told him of the union activity outside. He spoke to two or three supervisors, telling at least one not to join the new union, and asked four or five of the workers not to make any move. Late in the afternoon he called Young, an officer of Local 249, to come up and see if the situation could be straightened out. While Young and Wisotsky, of Local 249, were in Nadaline's office, telegrams were received from Local 422, claiming to

represent a majority both at Elmsford and the Bronx. Young asked Nadaline to sign a contract, but Nadaline refused because of the telegrams from Local 422.

On September 17, Local 249 notified both plants of an unconditional offer to return to work on the part of the strikers.

While the trial examiner found that Ricciardi, plant manager at Elmsford, and supervisors, Paraggio, Canning, Kurtz and Wilson either urged employees to listen to Local 422's organizers or to sign with Local 422, he held that the activity was not sufficiently brought home to the employer to constitute a violation of §8(a)(2) and recommended dismissal of those charges. He also found an offer of benefit to one striker, Ortiz, to induce her to return to work, a violation of §8(a)(1) but recommended against an order based on it, as an isolated instance. He found that Local 249 had a majority on the morning of May 28, but because he had found no unfair labor practice which assisted Local 422, recommended that §8(a)(5) charges (refusal to bargain) be dismissed. In keeping with his finding of no unfair labor practices, he recommended that the §8(a)(3) (refusal to reinstate) charges be dismissed.[1]

---

[1] The relevant provisions of the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. §151, et seq.) are as follows:

* * * *

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or

Appendix B

The Board disagreed with the trial examiner, finding illegal assistance to Local 422 resulting in loss of majority status to Local 249, which made refusal to bargain with Local 249 a violation, found illegal inducement, found that the strike was an unfair labor practice strike and that the striking employees had a right of reinstatement, and entered an appropriate cease and desist, bargaining, reinstatement and back pay order. It seeks enforcement of the order. We find substantial evidence in the record supporting the Board's findings and order, see *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951), and grant enforcement.

As is usual when examiner and Board disagree, respondent's contentions are by no means merely colorable. A review of the record and findings before us, however, leads us to agreement with the Board's conclusions as to the employer's responsibility here.

Respondent's position essentially is that it is not responsible for the disloyalty of Ricciardi and its supervisors in assisting Local 422, that Nadaline was neutral and did all that could be expected to establish company neutrality in the minds of the employees. But Nadaline's alacrity in breaking off contract talks

---

administration of any labor organization or contribute financial or other support to it: . . .

(3) by discrimiation in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * *

with Local 249 and his failure to do more than speak to a small number of employees with whom he came in contact, when plainly faced with the active encouragement of Local 422 in the plants, the actions of Ricciardi and the supervisors without strong repudiation by Nadaline, all serve to bolster the Board's conclusion of company implication in Local 249's displacement. *H. J. Heinz Co.* v. *NLRB,* 311 U. S. 514, 519-521 (1941).

The attempts to influence the employees to join Local 422 constituted unlawful assistance to a labor organization as well as unlawful interference with the employee's rights to choose their own representative. *NLRB* v. *Park Edge Sheridan Meats, Inc.,* 323 F. 2d 956, 959, 2 Cir. 1963.

Once illegal assistance is found, followed by dissipation of Local 249's majority, the refusal to bargain with Local 249 was plainly a §8(a)(5) and (1) violation. "A condition to any right of the employer to refuse . . . to bargain with a union which he reasonably thinks has lost its majority, . . . is that the loss of majority was not attributable to unfair labor practices of the employer." *NLRB* v. *Superior Fireproof Door & Sash Co., Inc.,* 289 F. 2d 713, 719, 2 Cir. 1961.

The strike was called in an effort to halt the signing up of the employees by Local 422 with the active and illegal assistance of respondent's supervisors and plant manager. The Board properly held this an unfair labor practice strike, and the respondent was obligated to reinstate the strikers when they unconditionally applied for reinstatement on September 17, 1962.

Appendix B

NLRB v. *Pecheur Lozenge Co.*, 209 F. 2d 393, 405, 2 Cir. 1953.

It is not disputed that Nadaline offered Ortiz, one of the pickets, a job which would carry a raise in pay from $65 to $100 a week if she would go in to work as a printer. This was a violation of §8(a)(1) of the Act, and taken in conjunction with the other violations which the Board properly found, was not so isolated an instance as to require no remedy.

Decree may issue enforcing the Board's order in full.

Appendix C

NATIONAL LABOR RELATIONS ACT

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor

organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made [and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 9(f), (g) (h)], and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).